

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Northland Cable Television, Inc.)
) CSR-7295-C
) NAL Account # MB-2008-4110-0001
) FRN # 0001-4797-47

**MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: May 14, 2008

Released: May 14, 2008

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, we find that Northland Cable Television, Inc. (“Northland”) apparently violated Section 614(b)(9) of the Communications Act of 1934, as amended, (the “Act”), Section 76.1601 of the Commission’s rules, Note 1 to Section 76.1601, and Section 76.1603(c),¹ by willfully repositioning KMVU-TV, Medford, Oregon (“KMVU”) to a new channel on its Yreka, California cable system during the national Nielsen sweeps period of April 26 – May 23, 2007, by willfully failing to provide thirty (30) days’ advance notice of this repositioning to KMVU and its cable subscribers, and by willfully failing to provide thirty (30) days’ advance notice to its cable subscribers and the relevant franchising authority prior to its eventual deletion of KMVU from its cable system. Based upon a review of the facts and circumstances surrounding these violations, we find that Northland is apparently liable for forfeiture in the amount of twenty thousand dollars (\$20,000.00).

II. BACKGROUND

2. Broadcasting Licenses, L.P. (“BLLP”), licensee of television station KMVU,² filed a Complaint with the Commission against Northland on June 12, 2007, in which it alleges that Northland violated statutory requirements and the Commission’s rules when it ceased carriage of KMVU without providing the required prior notices to both the station and the public.³ In addition, KMVU maintains

¹ 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601; Note 1 to 47 C.F.R. § 76.1601; and, 47 C.F.R. § 76.1603(c).

² Unless otherwise specified, we hereafter refer to broadcast station KMVU as the complainant rather than its licensor, BLLP.

³ Complaint by Broadcasting Licenses, L.P., filed June 12, 2007, at 1, 3 (hereinafter “Complaint”). Although KMVU’s Complaint originally pleads that it was “deleted” from Northland’s cable system, *see* Complaint at 3, in light of Northland’s admission that it repositioned KMVU, KMVU has subsequently sought liability against
(continued...)

that Northland replaced it with KCVU-TV, Paradise, California (“KCVU”)⁴ during a national Nielsen sweeps period, again in violation of the Commission’s rules.⁵ KMVU also asserts that Northland failed to provide KMVU with network non-duplication protection when it was replaced by KCVU on Northland’s cable system.⁶ In view of the above allegations, KMVU asks the Commission to impose a monetary forfeiture against Northland.⁷ Northland filed an Opposition to this Complaint⁸ to which KMVU has filed a Reply.

3. The facts as alleged in the pleadings show that prior to Northland’s undisputed⁹ repositioning and deletion of KMVU, Northland and KMVU had been negotiating the extension of a retransmission consent agreement to carry KMVU, an affiliate of the Fox television network (the “Fox Network”).¹⁰ During this time, Northland was carrying KMVU on its cable system in Yreka, California.¹¹ Under the existing retransmission consent terms, Northland’s right to retransmit KMVU was to lapse on May 26, 2007.¹²

4. On May 15, 2007, approximately two weeks prior to the lapse of its retransmission consent agreement with KMVU, Northland repositioned KMVU from cable channel 11 to cable channel 98 on its Yreka system.¹³ Concurrently on May 15, 2007, Northland replaced KMVU with KCVU and publicly advertised in the Siskyou Daily News of Yreka, California, that it was “proud to add FOX 30 [KCVU] from Chico to [its] channel line-up... now on Northland Cable Channel 11...”¹⁴ On May 23, 2007, Northland returned KMVU to its original channel, having thereby created ‘a channel positioning lapse’ of eight days.¹⁵ This lapse took place during the national Nielsen sweeps period of April 26 – May 23, 2007.¹⁶

(...continued from previous page)

Northland for both deletion and repositioning, arguing that as a matter of law that there is no distinction between these actions under the Act and the Commission’s rules. *See* Reply to Opposition to Complaint by Broadcasting Licenses, L.P., filed July 17, 2007, at 2-3 (“Reply”). We have considered both deletion and repositioning in our analysis. *See infra* ¶ 6.

⁴ We note that KMVU is located in the Nielsen Designated Market Area (“DMA”) of Medford-Klamath Falls in Oregon, whereas KCVU is located in the Nielsen DMA of Chico-Redding in California.

⁵ Complaint at 1.

⁶ *Id.*

⁷ *Id.*

⁸ Opposition to Complaint by Northland Cable Television, Inc., filed July 2, 2007 (“Opposition”).

⁹ Northland concedes that it repositioned KMVU and notes this was “technically improper” and an “error.” *See* Opposition at 1 and 2.

¹⁰ Complaint at 1 n.1; Reply at 3 n.3.

¹¹ Complaint at 1.

¹² Opposition at 2.

¹³ *Id.*

¹⁴ Complaint at 2; Exhibit B.

¹⁵ We have determined that the channel positioning lapse lasted eight days, though Northland asserts it lasted for seven days. *See* Opposition at 2.

¹⁶ Complaint at 1.

5. Northland did finally delete KMVU on May 26, 2007, and according to Northland this occurred because KMVU refused to extend the terms of its retransmission consent.¹⁷ Prior to deletion, Northland's systems had used a character driven message that began to run on May 2, 2007, to advise their customers of the potential deletion of KMVU as of May 26, 2007.¹⁸ This character driven message effectively provided Northland's customers with 24 days' notice. Though KMVU was not notified of its repositioning on May 15th, Northland claims KMVU was at least aware of the impending circumstances of its deletion on May 26th because it was involved in the negotiations for granting retransmission consent before that date.¹⁹

III. DISCUSSION

A. Repositioning Without Requisite Notice During a Nielsen Sweeps Period

6. As KMVU correctly points out, Section 614 of the Act provides that a cable operator may not delete *or reposition* a local commercial television station without first having provided 30 days prior notice to that station, *and* a deletion *or repositioning* cannot occur "during a period in which major television ratings services measure the size of audiences of local television stations."²⁰ This is mirrored in Section 76.1601 of the Commission's rules, which requires that such 30 day notice be provided to both the broadcast television station and to subscribers of the cable system.²¹ The corresponding Note to Section 76.1601 clarifies that no deletions or repositionings are to occur during a period in which ratings services measure audience sizes, as audiences are typically measured "during the four national four-week ratings periods – generally including February, May, July and November – commonly known as audience sweeps."²²

7. Northland's undisputed repositioning of KMVU occurred during the national Nielsen sweeps period of April 26 – May 23, 2007, and its failure to provide 30 days' advance notice of that repositioning consistent with the Commission's rules to *either* its cable subscribers *or* to KMVU itself violated Section 614(b)(9) of the Act, Section 76.1601 of the Commission's rules, and Note 1 to Section 76.1601.²³ In addition to failing to provide notice of its repositioning of KMVU consistent with the statutory requirements and the Commission's rules, Northland's repositioning of KMVU during the Nielsen sweep period at the time the parties were negotiating for an extension of their retransmission consent agreement is particularly egregious, because "[d]uring sweeps periods Nielsen Media Research's local market measurement service collects demographic viewing data which is used by local television stations, cable systems, advertisers and their agencies to buy and sell commercial advertising as well as make programming decisions."²⁴ As we discuss below, the egregiousness of these apparent violations calls for forfeiture.

¹⁷ Opposition at 2-3. As of the date of KMVU's June 12, 2007, Complaint, Northland had continued carriage of KCVU in place of KMVU. *See* Complaint at 4.

¹⁸ Opposition at 3, n.1.

¹⁹ *Id.*

²⁰ 47 U.S.C. § 534(b)(9).

²¹ 47 C.F.R. § 76.1601.

²² Note 1 to 47 C.F.R. § 76.1601.

²³ 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601; Note 1 to 47 C.F.R. § 76.1601.

²⁴ *Time Warner Cable*, 15 FCC Rcd 7882, 7883, ¶ 3 (2000) (citing <http://www.nielsenmedia.com>).

8. The Act and the Commission's rules also apply to KMVU's eventual deletion from Northland's system on May 26th, for which Northland provided only 24 days of notice to its subscribers that it would not carry KMVU after May 26th, and *not* the requisite 30 days' notice. Even if KMVU had constructive notice of this impending deletion, KMVU received no formal notice of it. Finally, we should note that although KMVU has not alleged a violation of Section. 76.1603(c), Northland's acts also violate that rule provision, which requires a cable system to give 30 days' written notice to both subscribers and local franchising authorities before implementing any rate or service change.²⁵

B. Network Non-Duplication Rights

9. We decline to find a violation of KMVU's network non-duplication rights. KMVU asserts it was granted network non-duplication rights through KMVU's affiliation agreement with the Fox Network.²⁶ The contractual terms granting these rights are not specified or attached to the Complaint. KMVU argues it holds network non-duplication rights in a protected geographic zone extending 55 miles from its community of license.²⁷ KMVU argues that because it may measure its protected network non-duplication zone from either market in its hyphenated market of Medford-Klamath Falls, Northland's cable system located in Yreka, California – located less than 55 miles from Medford – must therefore fall within KMVU's protected network non-duplication zone.²⁸ Therefore, KMVU argues Northland cannot retransmit the network programming of KCVU within that protected zone without violating KMVU's network non-duplication rights.²⁹

10. Broadcast station licensees are entitled to exercise non-duplication rights pursuant to Section 76.92 of the Commission's rules in accordance with the contractual provisions of their network-affiliate agreements.³⁰ However, a cable operator is compelled by law not to carry duplicative programming only “[u]pon receiving notification pursuant to [Section] 76.94.”³¹ Section 76.94 describes the procedures that a broadcast station must follow to provide notice to a cable system operator in order to perfect its non-duplication rights. In particular, the rule calls for notification of cable systems within 60 days of the broadcaster signing a contract providing it with network non-duplication protection, or in the alternative, it calls for the broadcaster to provide a “modified notice.”³² The kinds of information

²⁵ 47 C.F.R. § 76.1603(c); *see Time Warner Cable*, 21 FCC Rcd 9016, 9023, ¶ 21 (2006). During the period of Northland's violations, KMVU and Northland were heavily involved in negotiating a retransmission consent agreement for Northland to carry KMVU. While Northland has not filed a formal complaint against KMVU for failing to negotiate for retransmission consent in “good faith,” Northland argues that KMVU actively increased the cost for its retransmission consent demands to several times what it previously charged per customer, and actively sought to interfere with a valid retransmission consent agreement between Northland and Sainte Television Group – licensee of KCVU. Opposition at 6. The Commission does not address these claims. Furthermore, the impending lapse of the retransmission agreement for KMVU provides no excuse for Northland's actions because Northland would have been in violation for removing programming during a sweeps period, *even if* the retransmission consent agreement had lapsed *during* that period. *See Time Warner*, 15 FCC Rcd at 7885, ¶ 7.

²⁶ Complaint at 4.

²⁷ *Id.* at 3.

²⁸ *Id.* at 3-4, citing 47 C.F.R. § 76.92(a) and Note to 47 C.F.R. § 76.92(g).

²⁹ *Id.* at 4.

³⁰ 47 C.F.R. § 76.93.

³¹ 47 C.F.R. § 76.92(a) (emphasis added).

³² 47 C.F.R. § 76.94(b).

required by each type of notice are specific and varied.³³ However, “[i]f a broadcaster fails to provide notice to a cable system within 60 days of the signing of a new contract containing [syndicated exclusivity] rights, all of these rights under the contract (vis-à-vis that cable system) are lost (although they can be recaptured by recontracting for them).”³⁴ The same 60 day notification principles that apply to syndicated exclusivity rights apply in the network non-duplication context, albeit with some modifications.³⁵

11. KMVU alleges it invoked its network non-duplication rights by sending an email to Northland on May 16, 2007, advising Northland that it was precluded from entering a retransmission consent agreement with KCVU for carriage on Northland’s cable system serving Siskiyou County.³⁶ In response to KMVU’s claim of network non-duplication, Northland maintains that because KMVU never provided it with the required 60 day notice in the proper form, as mandated by the Commission’s rules, any claim to such rights is without merit.³⁷ We find that the email provided by KMVU does not meet the Commission’s notice requirements described above for perfecting network non-duplication rights.³⁸ KMVU has also failed to introduce any other evidence that it perfected its rights for network non-duplication protection.

C. Forfeiture

12. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.³⁹ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no

³³ Compare 47 C.F.R. § 76.94(a)(1)-(3) with 47 C.F.R. § 76.94(b)(1)-(3).

³⁴ *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Memorandum Opinion and Order, 4 FCC Rcd 2711, 2723, ¶ 72 (1989).

³⁵ The syndicated exclusivity (or “syndex”) rules are largely in conformance with the network non-duplication rules so as to streamline procedures for cable operators except for a few instances which are not relevant here. See *id.* at 2726-27, ¶¶ 81-88.

³⁶ Complaint at 4 and Exhibit A (Email from Cary Jones, KMVU to Paul Milan, Northland Cable (May 16, 2007)). Though KMVU’s May 16 email discusses Siskiyou County, KMVU’s complaint only alleges network non-duplication rights with respect to Northland’s cable system in Yreka, California and we are limiting our consideration to Yreka. See *supra* para. 9 and n.29; see also Complaint at 3-4. We address any claims with respect to Northland’s Mt. Shasta system in a separate order.

³⁷ Opposition at 3-4.

³⁸ See 47 C.F.R. § 76.94(a)(1)-(3) and 47 C.F.R. § 76.94(b)(1)-(3).

³⁹ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. See 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *S. Cal. Broad. Co.*, 6 FCC Rcd 4387, 4388, ¶ 5 (1991). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *S. Cal. Broad. Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

such forfeiture penalty should be imposed.⁴⁰ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁴¹ We conclude under this standard that Northland is apparently liable for a forfeiture for its apparent willful violation of Section 614(b)(9) of the Act, Section 76.1601 of the Commission's rules, Note 1 to Section 76.1601, and Section 76.1603(c),⁴² due to its failure to provide thirty (30) days' advance notice of the repositioning of KMVU to either its cable subscribers or to KMVU itself, due to its failure to provide thirty (30) days' advance notice to its cable subscribers and the relevant franchising authority prior to its eventual deletion of KMVU from its cable system serving Yreka, California, and for its repositioning of KMVU on its Yreka cable system during the national Nielsen sweeps period of April 26 – May 23, 2007.

13. After considering the record and all of the factors contained in Section 503(b)(2)(D) of the Act,⁴³ and the Forfeiture Policy Statement, we believe a twenty thousand dollar (\$20,000.00) forfeiture is appropriate in this case. As the Commission has stated before, "[u]nder these standards, \$7,500 is the base forfeiture amount for a willful and repeated violation of the cable broadcast signal carriage rules, although the Commission and the Bureau retain the discretion not to issue any forfeiture, or to issue a higher or lower forfeiture."⁴⁴ We find a forfeiture of \$20,000.00 is warranted in light of the seriousness of Northland's violations and due to its willful conduct in repositioning KMVU on the cable system serving Yreka, California during a Nielsen sweeps period, due to its failure to provide necessary notice of this repositioning to KMVU and its cable subscribers, and due to its failure to provide 30 days' notice of KMVU's eventual deletion to its cable subscribers and the relevant franchising authority.⁴⁵

IV. ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED THAT**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, Northland Cable Television, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of Twenty Thousand Dollars (\$20,000.00) for willfully violating Section 614(b)(9) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(b)(9), and Section 76.1601, Note 1 to Section 76.1601, and Section 76.1603(c) of the Commission's rules, 47 C.F.R. § 76.1601, Note 1 to 47 C.F.R. § 76.1601, and 47 C.F.R. § 76.1603(c).

15. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty days of the release of this Notice, Northland Cable Television, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

16. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced in the caption above. Payment by check or money

⁴⁰ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁴¹ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

⁴² 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601; Note 1 to 47 C.F.R. § 76.1601; and, 47 C.F.R. § 76.1603(c).

⁴³ 47 U.S.C. § 503(b)(2)(D).

⁴⁴ *Time Warner Cable*, 16 FCC Rcd 5403, 5404, ¶ 4 (2001) (citing 47 C.F.R. § 1.80(b)(4), *amended by* 47 C.F.R. § 1.80(b)(1) (2004)).

⁴⁵ 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601; Note 1 to 47 C.F.R. § 76.1601; and, 47 C.F.R. § 76.1603(c).

order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox 979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

17. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, to the Attention of: Ron Parver, Assistant Division Chief, Policy Division, Media Bureau, Room 4-A822, and must include the NAL/Acct. No. referenced in the caption above.

18. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

19. Requests for payment of the full amount of the NAL under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.

20. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Dennis P. Corbett and John W. Bagwell, Leventhal, Senter & Lerman, PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809, and to Steven J. Horvitz, Davis Wright Tremaine LLP, 1919 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20006.

21. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁴⁶47 C.F.R. § 0.283.